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**In the Supreme Court
OF THE
United States**

OCTOBER TERM, 1989

RONALD V. CLOUD,
Petitioner,

VS.

UNITED STATES OF AMERICA,
Respondent.

**On Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit**

**REPLY BRIEF IN SUPPORT OF
PETITION FOR A WRIT OF CERTIORARI**

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No. 89-455

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INTRODUCTION

The main question raised by this Petition is whether a court has the authority, under the Victim and Witness Protection Act ("VWPA"), 18 U.S.C. Sections 3663 *et seq.*, to impose \$7.5 million in restitution for an insurer who executed a settlement agreement expressly waiving any rights to subrogation against Petitioner. The VWPA is intended to compensate victims of crime who otherwise would be forced to initiate litigation against the defendant or forego compensation altogether. The VWPA is inapplicable in this case, however, because a large and well-represented insurance company ("Continental"), acting in its own interest, expressly waived its subroga-

tion rights in return for having to pay only \$7.5 million on a \$20 million claim. Under these circumstances, Continental is not a "victim" within the meaning of the VWPA.

This issue is ripe for review because of a split of authority among the Circuits. *United States v. Bruchey*, 810 F.2d 456 (4th Cir. 1987) directly dealt with the impact of settlement agreements on a court's authority under the VWPA. The court's ruling, that such agreements render the VWPA inapplicable, is the law of the Fourth Circuit. The Ninth Circuit's opinion in this case directly conflicts with the Fourth Circuit's position on this issue. District courts throughout the country are now faced with a split of authority which this Court should now resolve.

II.

ARGUMENT

A. In View Of Continental's Express Waiver Of Subrogation Rights Against Petitioner, Continental Is Not A "Victim" Withing The Meaning Of The VWPA.

After the primary victim, Hibernia Bank, discovered that it had sustained a loss in connection with the \$20 million loan it provided to Mr. Jon Perroton and his company, Hibernia filed a claim of loss in the amount of \$20 million against its insurer, Continental. Continental and Hibernia settled Hibernia's claim pursuant to a compromise whereby Continental agreed to pay Hibernia \$7.5 million. Continental further agreed to waive all subrogation rights or causes of action it may have had against any party connected with Hibernia's claim of loss, including Petitioner. In turn, Hibernia agreed that it would not pursue its claim of loss for \$20 million against Continental. Petitioner and Hibernia subsequently entered into an

agreement whereby \$1.5 million was paid to Hibernia by Petitioner to resolve all potential claims. (Pet. 8)

Under these circumstances, judicial intervention by way of an order for restitution is unauthorized and unnecessary. In this case there is no "victim" which a court must protect. Both Continental and Hibernia pursued *and resolved* their legal recourse against Petitioner. A district court should not be allowed to impose a monetary judgment under the VWPA that would be barred by normal civil processes due to the settlements. Because of the settlement agreement and Continental's express waiver of subrogation from Petitioner, Continental should not be considered a "victim."¹

The government contends that a victim's ability under the VWPA to enforce a restitution award as a civil judgment is not germane to whether a settlement agreement, such as the one in this case, divests a court of authority to impose restitution under the VWPA. The fallacy of this reasoning is that it creates the type of dissymmetry between penal restitution and civil compensatory law that the VWPA is intended to avoid. An insurance company that compensates a victim of a crime has a civil cause of action for subrogation. Accordingly, restitution under the Act can be properly awarded to an insurance company where there are no voluntarily executed settlement agreements waiving subrogation or

¹An insurance company may be considered a "victim" where it has not waived any subrogation rights. The VWPA does authorize restitution to an insurance company where there are no voluntarily executed settlement agreements between the defendant and any alleged victims resolving all claims of liability. *United States v. Durham*, 755 F.2d 511 (6th Cir. 1985), *United States v. Youpee*, 836 F.2d 1181 (9th Cir. 1988). When an insurance company waives its subrogation rights in consideration for a smaller payment, however, it should not be deemed a "victim" for purposes of the VWPA.

otherwise resolving all claims of liability. *Durham, supra, Youpee, supra.* In this case, however, the district court, in effect, granted a summary judgment on a cause of action (i.e. subrogation) that Continental expressly decided to waive. *A district court should not be able to resurrect or create a right enforceable as a civil judgment that an insurance company has expressly waived.* Continental was well-represented by counsel on this matter, and upon due reflection acted in its own self-interest. *The VWPA was not designed to create obligations or remedies not otherwise obtainable through civil compensatory law. Because the disposition of this issue will enhance judicial economy by obviating the need for litigation when settlements are reached, review by this Court is essential.*

B. There Is A Split Of Authority Between The Ninth And Fourth Circuits Regarding The Effect Of Voluntary Settlement Agreements On A Court's Authority Under The VWPA.

The government contends *Bruchey's* discussion of voluntary settlements is dicta. (Opposition, 6.) Contrary to the government's analysis, *Bruchey* involved more than just the time period within which restitution under the VWPA must be made. *Bruchey* specifically involved the effect, if any, of voluntary settlement agreements on a court's duties under the VWPA, and the confluence between the provisions of the VWPA and civil compensatory law. The Fourth Circuit's pronouncements regarding the effect of settlements on restitution litigation under the VWPA is the law of that Circuit. *Bruchey* and the Ninth Circuit's conflicting opinion in this case will force lower

courts to struggle with an obvious split of authority. The questions presented by this Petition are thus imminently appropriate for review by this Court.

DATED: November 30, 1989

Respectfully submitted,

WYMAN BAUTZER KUCHEL & SILBERT
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DAVID R. FIELDS

By _____
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Attorneys for defendant-appellant
Ronald V. Cloud



PROOF OF SERVICE BY MAIL

STATE OF CALIFORNIA }
COUNTY OF LOS ANGELES } ss.:

I am a citizen of the United States and a resident of or employed in the City of Los Angeles, County of Los Angeles; I am over the age of 18 years and not a party to the within action; my business address is 1706 Maple Avenue, Los Angeles, California 90015.

On December 1, 1989, I served the within Reply Brief in re: "Ronald V. Cloud vs. United States of America" in the United States Supreme Court, October Term, 1989, No. 89-455, on all parties interested in said action, by placing three true copies thereof enclosed in a sealed envelope, with postage thereon fully prepaid, in the United States Post Office mail box at Los Angeles, California, addressed as follows:

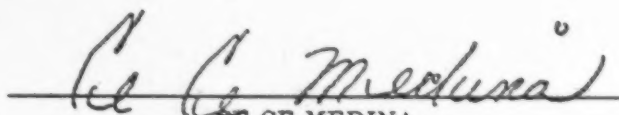
Solicitor General
Department of Justice
Washington, D.C. 20530

All parties required to be served have been served.



I declare under penalty of perjury that the foregoing is true and correct.

Executed on December 1, 1989, at Los Angeles, California.


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